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No. 48

In the Supreme Court of the United States

OCTOBER TERM, 1932

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
PETITIONER

v.

PHILIP ELTING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 350–362) is reported in 45 F. (2d) 405. See also 46 F. (2d) 315. The opinion of the Circuit Court of Appeals (R. 409–415) is reported in 55 F. (2d) 1048.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 8, 1932. (R. 415.) The petition for certiorari was filed April 29 and was

granted May 23, 1932, 286 U. S. 539. (R. 416–417.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924, as construed and applied by the Secretary of Labor, is constitutional.

2. Whether fines imposed upon the petitioner by the Secretary of Labor under Section 9, both prior to and after its amendment by the Immigration Act of 1924, for bringing to the United States aliens who were found upon arrival to be afflicted with diseases or disabilities specified in that section, and who were excluded by reason thereof, may be recovered from the Collector of Customs when the Secretary of Labor has found that the existence of such diseases or disabilities might have been detected by means of a competent medical examination at the time of foreign embarkation.

3. Whether the findings of the Secretary were arbitrary or capricious.

Other questions presented are discussed in Point IV of the argument (pp. 31–38, *infra*).

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix (pp. 43–49, *infra*).

STATEMENT

This is a suit by the petitioner upon fifteen causes of action to recover from the Collector of Customs certain fines imposed upon it by the Secretary of Labor under Section 9 of the Immigration Act of 1917 and under that section as amended by Section 26 of the Immigration Act of 1924. (R. 1–21.) By stipulation the case was tried before a jury of one. (R. 27.) After a hearing the trial judge directed a verdict in favor of the respondent on all the causes of action except the ninth, eleventh, and fifteenth, as to which he directed verdicts for the petitioner in the total sum of $2,412.63, plus interest. Judgment was entered accordingly. (R. 26, 203.) Upon appeal by both parties the Circuit Court of Appeals affirmed the judgment of the District Court except as to the fifteenth cause of action, as to which the judgment was reversed. (R. 415.)

The essential facts, which seem to be undisputed, are as follows:

Between the years 1923 and 1927 the petitioner, an Italian corporation, brought to the United States in its vessels fifteen aliens, all of whom were found upon arrival to be inadmissible because of being affected with either (1) a loathsome or dangerous contagious disease, or other disease or disability specified in Section 9 of the Immigration Act of 1917; or (2) a physical defect of a nature which

might affect the alien's ability to earn a living.[1] In each case the examining physicians at Ellis Island certified that in their opinion the existence of the disease, disability, or defect involved might have been detected by a competent medical examination at the port of foreign embarkation. (R. 215, 232, 240, 247, 254, 263, 269, 272, 288, 303, 317, 340, 352, 372, 384, 393.) In each instance the petitioner was notified by the Secretary of Labor of the findings of the medical examiners, advised that such findings indicated its liability to a fine under Section 9 of the Immigration Act of 1917, or under that section as amended by Section 26 of the Immigration Act of 1924, and was given 60 or 30 days in which to have a hearing. (R. 352.)

In each case the petitioner filed with the Commissioner General of Immigration an unverified letter of protest against the imposition of the fine, stating generally that it was the regular practice of the petitioner to have each immigrant carefully examined by competent doctors prior to embarkation, and that the disease or disability by reason of which the fine was proposed either did not exist at the time of embarkation or could not then have been discovered by means of a competent medical examination; or that the alleged physical defect

[1] All the aliens were excluded and deported except the two, Rullo and De Sanctis, who were involved in the ninth and eleventh causes of action, respectively, who were eventually admitted after hospitalization and cure at Ellis Island. See p. 7, *infra*.

did not exist prior to embarkation, or was of such a nature as, in the opinion of petitioner's doctors, could not affect the alien's ability to earn a living. In some cases the letters of protest stated that the American consul had granted the alien a quota-immigration visa, a nonquota visa, or an "in transit" certificate, as the case might be. (R. 221, 224, 236, 249, 253, 258, 267, 276, 281, 294, 311, 338, 368, 378, 399.) In two cases[2] the letters of protest were accompanied by brief affidavits, and in another case by copies of correspondence, which tended to confirm some of the statements in the letters. (R. 283–286, 313–316, 381–382.) In all cases fines were imposed, the Secretary of Labor ruling formally in each case that the matter submitted by the petitioner in and with its letters of protest did not overcome the force of the certificate of the medical examiners at Ellis Island. (R. 214, 222, 235, 245, 251, 257, 264, 271, 277, 293, 306, 334, 367, 376, 390.) The fines were paid under protest. (R. 350.)

The "files" or "records" upon which the Secretary of Labor based his decisions (R. 69) as to the petitioner's liability for the fines consisted, in general, of the transcript of the hearing and examination before the Special Board of Inquiry at Ellis Island, wherein the admissibility of the alien was passed upon, the petitioner's letters of protest, ac-

[2] One of these was the Fusco case, involving the 10th cause of action, the facts as to which are set forth at length in the petitioner's brief as an "illustrative" case.

companied in three instances by affidavits or copies of correspondence, and various communications of an intradepartmental character relating to the disposition of the alien by the Secretary (R. 213–341, 367–403).

At the trial the petitioner introduced extensive evidence, none of which had been presented to the Secretary of Labor, tending to show that all immigrant passengers upon the petitioner's vessels were put through two or more careful medical examinations in Italy prior to embarkation, and that the persons who conducted these examinations were skilled and competent doctors. (R. 27–130.) This testimony was admitted, subject to motion to strike out, over the objection of the respondent that in determining whether the fines were properly imposed the court could consider only the evidence which was presented to the Secretary of Labor. (R. 30, 68, 69, 142, 201.) The respondent, reserving his objection to the admission of evidence not before the Secretary, introduced evidence to rebut the assertions of the petitioner based upon evidence not presented to the Secretary. (R. 131–198.) Subsequently the respondent's motion to strike out all testimony relating to the medical examination of aliens abroad by the petitioner and other testimony not presented to the Secretary was granted, and an exception noted. (R. 202.)

The second, third, fifth, twelfth, thirteenth, fourteenth, and fifteenth causes of action involve special considerations, but for brevity the special facts

with respect to these causes of action are set forth only in the argument. (See Point IV, *infra.*)

The ninth and eleventh causes of action involved, respectively, the aliens Rullo and De Sanctis, who were excluded temporarily because of being afflicted with certain diseases, but who were thereafter admitted, under Section 22 of the Immigration Act of 1917 (U. S. C., Title 8, Sec. 159), after having been treated in the Ellis Island Hospital and cured. (R. 11, 14, 356, 367–368, 375–377.) Judgment was entered by the District Court for the petitioner in these causes (R. 26), which judgment was affirmed by the Circuit Court of Appeals (R. 415). There is no issue pending in this Court with respect to these two causes of action.

SUMMARY OF ARGUMENT

I

The penalty provisions of Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924, are constitutional.

Under Section 9 it is unlawful for a steamship company to bring to the United States any alien afflicted with (1) a loathsome or dangerous contagious disease, or other disability therein specified, or (2) a defect which may affect his ability to earn a living. Section 9 provides further for the payment to the Collector of Customs of penalties in the respective amounts of $1,000 and $250 if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was

afflicted with (1) such disease, disability or (2) defect at the time of foreign embarkation and that the existence of such disease, disability, or defect might have been detected by means of a competent medical examination at that time. The Collector is required to refuse to grant clearance papers to any vessel until any fines imposed have been paid or secured by deposit.

These provisions are substantially identical with Section 9 of the Immigration Act of 1903, which was construed and upheld as constitutional in *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320. It is true that the fines imposed by Section 9 of the 1917 Act, as amended, are greater in amount than those imposed by the 1903 Act,but this fact does not make the ruling in the *Stranahan* case inapplicable. Obviously the matter of the amount of the fine is a legislative rather than a judicial one. It is not asserted that the fines are so high as to be confiscatory, and it does not appear that they are out of proportion to the offenses prohibited. The constitutionality of provisions substantially identical to those here involved and imposing fines in substantially the same amounts has been accepted by the courts, apparently without question.

II

The finding of the Secretary that the disease, disability, or defect in question might have been detected by means of a competent medical examination at the port of foreign embarkation is

final, unless shown to be arbitrary or capricious, and accordingly the petitioner was not entitled to a judicial hearing *de novo* on this issue.

The administration of the immigration laws has been committed to the Secretary of Labor. Under Section 9 the test of liability is the appearance of certain facts "to the satisfaction of the Secretary of Labor." This language negatives the contention that after the Secretary is satisfied as to the existence of the requisite facts the courts may try the question *de novo.*

The determination of the question whether the diseases or disabilities might have been detected by means of a competent medical examination does not involve the determination of any fact of a jurisdictional character nor of a fact upon which the enforcement of constitutional rights of a citizen depend, which would entitle the petitioner to a judicial hearing *de novo* within the rulings of *Ng Fung Ho* v. *White,* 259 U. S. 276, *Crowell* v. *Benson,* 285 U. S. 22, and other like cases cited by the petitioner.

III

The findings of the Secretary were not arbitrary or capricious. The examining physicians at Ellis Island certified as to each alien that the existence of the excluding disease or defect might have been detected by means of a competent medical examination at the time of foreign embarkation. In each

case the petitioner was notified of the proposed fine and granted a hearing, and in each instance it filed letters of protest, stating its reasons why the fine should not be imposed. In each case the Secretary of Labor concluded, after a consideration of the petitioner's protest, that the matter submitted by the petitioner did not overcome the force of the certificate of the medical examiners at Ellis Island. The Secretary's finding was thus made upon substantial evidence and only after due notice to the petitioner and opportunity for a hearing.

The Secretary was justified in basing his findings upon the certificates of the doctors at Ellis Island. Such certificates, though unaccompanied by the data on which they were based, were evidence of the facts therein stated for purposes of an administrative hearing.

IV

Petitioner's contention that a fine may not be imposed for bringing to the United States an alien with a defect which might affect his ability to earn a living when the alien's admissibility can be finally determined only by the immigration officials in the United States is without merit. There is nothing in the statute which creates an exemption from liability in cases where the nature of the defect is such that its detectability is difficult, or where the question of its effect upon the ability of the alien to earn a living is subject to a difference of opinion.

The known purpose of Section 9 was to exclude diseased and defective aliens. The dangers inci-

dent to the admission of a diseased or defective alien exist even though the alien's stay in this country is only temporary. Aliens whose ultimate destination is not the United States but who intend merely to pass through the United States in transit are therefore within the letter and the spirit of the law.

Aliens to whom American consular visas have been issued prior to the time of embarkation are also within the statute, which expressly provides that, even though an alien has been issued an immigration visa, he shall not be entitled to enter the United States if, upon arrival, he is found to be inadmissible under the immigration laws.

ARGUMENT

I

SECTION 9 OF THE IMMIGRATION ACT OF 1917, AS AMENDED BY SECTION 26 OF THE IMMIGRATION ACT OF 1924, IS CONSTITUTIONAL

Under the first sentence of Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924 (pp. 43–46, *infra*), it is unlawful for any person to bring to the United States any alien afflicted with a loathsome or dangerous contagious disease or other disease or disability therein enumerated. That sentence provides further that—

> if it shall appear *to the satisfaction of the Secretary of Labor* that any alien so brought to the United States was afflicted with any

> of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person * * * shall pay to the collector of customs * * * the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation * * *. (Italics ours.)

By the second sentence of Section 9 it is made unlawful for any person to bring to any port in the United States an alien afflicted with a "physical defect of a nature which may affect his ability to earn a living," and a fine of $250, plus passage money, is imposed—

> if it shall appear *to the satisfaction of the Secretary of Labor* that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time * * *. (Italics ours.)

Administrative enforcement and collection of the fines thus imposed are insured by the further provision that—

> no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: Pro-

vided, That clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines * * *.

All the fines which are involved in this case were imposed under Section 9, as above quoted, or under that section as it existed prior to its amendment in 1924.[3] The petitioner contends that Section 9, as amended, violates the due process clause of the Federal Constitution for the reason that the amounts of the fines imposed thereby are excessive in view of the fact that they are imposed and enforced by administrative officials without judicial action of any sort.

This Court has held that Congress, when legislating as to matters exclusively within its control, may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and give to administrative officials the power to enforce such penalties without the necessity of judicial action. *Hampton & Co.* v. *United States,* 276 U. S. 394, 406; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320; *Passavant* v. *United*

[3] The only change made in Section 9 by the 1924 amendment was an increase in the amount of the fines imposed, the two fines above described being increased from $200 and $25, respectively, to $1,000 and $250. No attack is made upon the constitutionality of Section 9 as it existed prior to the 1924 amendment. The first nine causes of action herein involve fines which were imposed under Section 9 prior to the amendment. (R. 3–17.)

States, 148 U. S. 214. See also *Navigazione Libera Triestina* v. *United States,* 36 F. (2d) 631 (C. C. A. 9th); *Zakonaite* v. *Wolf,* 226 U. S. 272, 275.

In the *Stranahan* case, *supra,* the Court construed and upheld as constitutional a provision of the Immigration Act of 1903 substantially identical with the one here involved.[4] This Court there held that it was competent for Congress to place upon steamship companies the duty of subjecting immigrants to a competent medical examination prior to embarkation and refusing passage to those failing to meet the necessary requirements, to impose a reasonable money penalty for failure to meet this duty, and to delegate to an administrative official the exclusive power to determine whether this duty had been adequately performed and to enforce the execution of the penalty without recourse to judicial action. In its opinion the Court said (pp. 339–340):

> * * * over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals. * * * As the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject, it must follow that if Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such pro-

[4] Section 9 of the Act of March 3, 1903, c. 1012, 32 Stat 1213.

> hibitions by penalities enforcible by administrative authority, it follows that the constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. * * *

The petitioner apparently concedes the foregoing, but contends that the fines imposed under Section 9 of the 1917 Act, as amended, are so much higher than those involved in the *Stranahan* case that they are unreasonable and excessive, and that therefore the *Stranahan* case is not applicable to the instant case. But, clearly, the matter of the amount of the fine is a legislative rather than a judicial one. It is not asserted and there is nothing to indicate that the fines are so high in amount as to be confiscatory, or as to interfere seriously with the operations of the petitioner and other steamship companies, or that the fines are out of all proportion to the offenses prohibited.

The petitioner seems to contend that the statute is unconstitutional because it affords no judicial review of the Secretary's action. But the court below did not hold, and the Government does not contend (see Point II, *infra*), that the Secretary's action in imposing a fine can not be reviewed judicially, if it is based upon an erroneous application of the statute, or if there is no evidence to support it, or if it is clearly arbitrary or capricious. Judicial review within these limits clearly meets all

constitutional requirements. *Phillips* v. *Commissioner,* 283 U. S. 589, 599–600.

The petitioner cites *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, as holding that a money penalty in the amount of those here involved may not constitutionally be enforced by administrative action. But those cases merely held that an exaction which was in essence a *penalty for a crime* could not be enforced *as a tax* through the summary action of executive officers. *United States* v. *Regan,* 232 U. S. 37, and other cases cited by the petitioner, like the petitioner's arguments with respect to the powers of the Interstate Commerce Commission, the Federal Trade Commission, and other bodies, would seem to have no application to the instant case.

Since the *Stranahan* case, the constitutionality of provisions substantially identical with those here involved and imposing fines in substantially the same amounts has been accepted by the courts, apparently without question. *The Nanking,* 290 Fed. 769, 771 (C. C. A. 9th); *Navigazione Libera Triestina* v. *United States,* 36 F. (2d) 631 (C. C. A. 9th); *North German Lloyd* v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d); *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.); *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.). See also *United States* v. *New York S. S. Co.,* 269 U. S. 304, and *United States* v. *Nord Deutscher Lloyd,* 223 U. S. 512.

II

THE FINDING OF THE SECRETARY THAT THE DISEASE, DISABILITY, OR DEFECT MIGHT HAVE BEEN DISCOVERED BY MEANS OF A COMPETENT MEDICAL EXAMINATION IS FINAL, UNLESS SHOWN TO BE ARBITRARY OR CAPRICIOUS[6]

The fact that the petitioner brought to this country aliens who were afflicted with diseases or other defects specified in the statute is conceded. The only disputed issue is whether the diseases or defects might have been detected by means of a competent medical examination abroad. In each case the Secretary so found. But the petitioner contends that the Secretary's findings were erroneous and that it is entitled to a trial *de novo* on this issue. The respondent contends that the decision of the Secretary is final and that judicial review is limited to a determination of whether the Secretary has abused his discretion. It is not enough for the petitioner or for a court to say that the excluding defects could not have been discovered by a competent examination, for the United States, by the only voice authorized to express its will, has said this is not so. Cf. *Polymeris* v. *Trudell,* 248 U. S. 279, 281.

This Court has frequently pointed out that the administration of the immigration laws has been

[6] For a closely related argument involving another penalty provision of the immigration laws, see Point II in the brief for the petitioner in *Elting* v. *North German Lloyd*, No. 42, present term, which case is to be argued immediately prior to the argument in the instant case.

committed to the Secretary of Labor, and has held that in such administration his findings of fact, within the scope of his authority, are final unless arbitrary or capricious, and his discretion will not be interfered with unless an abuse of discretion is shown. *Polymeris* v. *Trudell, supra*; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *Kwock Jan Fat* v. *White,* 253 U. S. 454, 457; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *United States* v. *Ju Toy,* 198 U. S. 253. Numerous like rulings have been made by this Court with reference to statutory provisions, other than immigration laws, which have invested administrative officials with discretionary power. *Phillips* v. *Commissioner,* 283 U. S. 589; *United States* v. *Williams,* 278 U. S. 255; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Duquesne Steel Foundry Co.* v. *Burnet,* 283 U. S. 799; *Ma-King* v. *Blair,* 271 U. S. 479, 483; *Johnson* v. *Drew,* 171 U. S. 93; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Passavant* v. *United States,* 148 U. S. 214.

In Section 9 of the Immigration Act of 1917 Congress has indicated in the plainest of language its intention that the facts upon which liability is predicated shall be determined *exclusively* by the Secretary of Labor. The test of liability is the appearance of certain facts "to the satisfaction of the Secretary." This language is incompatible with the suggestion that after the Secretary has been satisfied as to the existence of the requisite

facts any person aggrieved may have the same issue tried anew in the courts.* See *United States* v. *Morris,* 10 Wheat. 246, 284–285.

The contention of the petitioner that it is entitled to a trial *de novo* has been answered by this Court in the *Stranahan* case. The language of Section 9 of the 1903 Act, there involved, is substantially identical with that of Section 9 of the 1917 Act. With respect to the prior Act the Court said (p. 333):

> We think it is also certain that the power thus lodged in the Secretary of Commerce and Labor *was intended to be exclusive,* * * * and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, *not requiring a resort to judicial power for their enforcement.* * * * (Italics ours.)

The entire decision in that case was predicated upon the assumption that the statute gave to the Secretary the power to impose and enforce the

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* In the report of the Senate Committee on Immigration with respect to the provision of the Immigration Act of 1903 which was the predecessor of Section 9 of the 1917 Act, the Committee said (Senate Report No. 2119, 57th Cong., 1st Sess., p. vi):

"Section 10 of the measure under consideration imposes a penalty of $100 to be imposed by the Secretary of the Treasury for each case brought to an American port, provided that *in his judgment* the disease might have been detected by means of medical examination at the port of embarkation." (Italics ours.)

fines "without resort to the courts." The very purpose of Section 9 in vesting authority in the Secretary to impose and enforce the fines was, as pointed out in the *Stranahan* decision (p. 337)—

> by the avoidance of controversy and delay, to secure the efficient performance by the steamship company of the duty to examine in the foreign country, before embarkation, * * *.

This purpose would be completely defeated if in every case the courts possessed the power to determine whether the Secretary's decision was correct. Congress plainly desired to leave the administration of the law "to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion." See *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 265.

The various provisions of the immigration laws imposing penalties upon steamship companies for bringing diseased, defectiye, or otherwise inadmissible aliens to the United States[7] have frequently been before the Federal courts, particularly those of the Second Circuit. In construing these provisions the courts have been careful to point out that unless manifestly wrong or wholly arbitrary or capricious the decision of the Secretary is final.

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[7] In addition to the penalty provisions here involved and other provisions of Section 9 of the Immigration Act of 1917, as amended, see Section 16 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 216).

North German Lloyd v. *Elting,* 48 F. (2d) 547 (C. C. A. 2d); *United States* v. *Compagnie Generale Transatlantique,* 26 F. (2d) 195 (C. C. A. 2d); *New York & Porto Rico S. S. Co.* v. *United States,* 52 F. (2d) 980 (S. D. N. Y.); *Lamport & Holt* v. *Elting,* 51 F. (2d) 1057 (S. D. N. Y.). Like conclusions have been reached with respect to provisions imposing penalties upon steamship companies for failure to detain on board or to deport alien seamen after notice from the Secretary of Labor.[8] *Navigazione Libera Triestina* v. *United States,* 36 F. (2d) 631 (C. C. A. 9th); *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.); *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 55 F. (2d) 340 (S. D. N. Y.); cf. *The Presidente Wilson,* 56 F. (2d) 742 (C. C. A. 2d).

It is true that in some cases the courts have allowed the recovery of fines imposed by the Secretary, but these decisions were either based upon the holding, express or implied, that the findings of the Secretary were arbitrary (*Svenska Amerika Linien* v. *Elting,* 46 F. (2d) 178 (S. D. N. Y.); *Spanish Royal Mail Line Agency, Inc.* v. *United States,* 45 F. (2d) 404 (S. D. N. Y.); *Clyde S. S. Co.* v. *United States,* 33 F. (2d) 343 (S. D. N. Y.)) or that there was an absence of facts upon which the power of the Secretary to act depended (*North German*

[8] See Section 10 of the Immigration Act of 1917, as amended by Section 27 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 146), and Section 20 (a) of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 167).

Lloyd v. *Elting*, 54 F. (2d) 997 (C. C. A. 2d), No. 42, present term, *supra; Compagnie Generale Transatlantique* v. *United States*, 51 F. (2d) 1053 (C. C. A. 2d); *Dollar Steamship Line* v. *Elting*, 51 F. (2d) 1035 (C. C. A. 2d); *Sinclair Navigation Co.* v. *United States*, 32 F. (2d) 90 (C. C. A. 5th); *Dollar Steamship Line* v. *Hyde*, 23 F. (2d) 910 (C. C. A. 9th); *Compagnie Francaise de Navigation a Vapeur* v. *Elting*, 19 F. (2d) 773 (C. C. A. 2d); *Pan-American Petroleum & Transport Co.* v. *United States*, 28 F. (2d) 386 (E. D. La.); *W. & C. T. Jones S. S. Corp.* v. *Hamilton*, 255 Fed. 799 (E. D. Va.); *Cunard S. S. Co.* v. *Stranahan*, 134 Fed. 318 (C. C., S. D. N. Y.)). While the Government does not accept the conclusions in all the foregoing cases as sound, it is significant that in none of these cases was it held that the courts could consider *de novo* the evidence before the Secretary and reverse his decision if they took a different view of the evidence.*

But apparently the petitioner's theory as to the construction of Section 9 is not based so much on the language of the statute as upon the conten-

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*There are one or two District Court decisions, in which the basis of the decision does not clearly appear, which seem to proceed upon the assumption that the court may determine for itself whether, on the facts, the fine should be imposed. *New York & Porto Rico S. S. Co.* v. *United States*, 58 F. (2d) 827 (S. D. N. Y.); *Bermuda & West Indies S. S. Co.* v. *Elting*, 45 F. (2d) 411 (S. D. N. Y.). If that is what these decisions hold, they can not be supported.

tion that in reviewing administrative decisions a court must try *de novo* any question of fact upon which the authority of the administrative officer depends. In support of its contention the plaintiff cites *In re Fassett,* 142 U. S. 479; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643; *Crowell* v. *Benson,* 285 U. S. 22, and other like cases. But these decisions are not applicable to the instant case. No facts of a jurisdictional character were in controversy before the Secretary. It is conceded that the petitioner brought the aliens to the United States and that upon arrival they were afflicted with diseases or defects which rendered them inadmissible. The only disputed issue is whether the diseases or defects might have been detected by competent medical examinations prior to embarkation. In other words, the facts upon which the authority of the Secretary to act depends are conceded, and the question is not whether the Secretary had the power to decide the issue, but whether he correctly decided it. There is no question here as to the *jurisdiction* of the Secretary, as was true in the *Ng Fung Ho* case, nor is there involved the final determination of facts "upon which the enforcement of the constitutional rights of the citizen depend," as was the situation in *Crowell* v. *Benson, supra.* Accordingly these decisions and the other like cases cited by the petitioner are inapposite. See *In re Neuwirth,* 123 Fed. 347 (C. C., S. D. N. Y.).

The petitioner complains that the Circuit Court of Appeals "appeared to be of the opinion that a transportation company is not entitled to a hearing of any kind," and that both courts below misconstrued the *Stranahan* case as making the medical certificate of the Ellis Island doctors conclusive of the condition of the alien, not only upon arrival but also at the time of embarkation. There is no proper basis for these assertions. The Circuit Court of Appeals, after pointing out that determination of the fact of foreign detectability of an excluding condition has been left to what would satisfy the Secretary, stated that it was not error "to treat the certificates of the medical examiners as evidence of the facts as therein stated." That the court below did not overstate the decision in the *Stranahan* case is apparent from pages 342–343 of the opinion in that case, wherein the Court pointed out that it is a distinction without a difference to argue that Congress has power to attach conclusive effect to the result of the medical examination for the purpose of exclusion, but has not the power "to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien." Indeed, the Court was apparently of the opinion that the Secretary's decision, in reliance upon the medical certificate, was so absolute that the carrier might be deprived of a hearing.

If the petitioner was not entitled to a trial *de novo* in the District Court, then that court was clearly right in refusing to consider and striking the evidence on this question which the petitioner introduced in that court but which it did not present to the Secretary of Labor. If the only question for judicial review is whether the Secretary's determination was arbitrary, the evidence which was stricken by the trial court is not material, since the Secretary can not be said to have acted arbitrarily with respect to evidence which was never presented to him. See *Denholm Shipping Co.* v. *Elting,* 55 F. (2d) 422 (S. D. N. Y.).

III

THE FINDINGS OF THE SECRETARY WERE NOT ARBITRARY OR CAPRICIOUS

To sustain its contention that the Secretary's findings were arbitrary the petitioner must establish either that a fair hearing was denied or that his decisions were not based upon any substantial evidence. It is not enough to show a state of proof upon which the court might reach a different conclusion. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284.

The facts as to the imposition of the fines are as follows (pp. 3–6, *supra*): The examining physicians at Ellis Island certified as to each alien that the existence of the excluding disease, disability, or defect might have been detected by means of a competent medical examination at the time of

embarkation. In each case the petitioner was notified of the findings of the medical examiners, advised that such findings indicated its liability to a fine, and given 60 or 30 days in which to have a hearing.[19] In each case the petitioner filed an unverified letter of protest, stating generally that it was the regular practice of the petitioner to have each immigrant carefully examined by competent doctors prior to embarkation, and that the disease, disability, or defect in question either did not exist at the time of embarkation or could not then have been discovered by means of a competent medical examination. In some cases the letters stated that the American consul had granted to the alien a quota-immigration visa, a nonquota visa, or an "in transit" certificate, as the case might be. The letters of protest were accompanied in two cases by affidavits, and in another case by correspondence, tending to confirm the statements made in the letters. In each case the Secretary of Labor concluded, after a consideration of the transcript of the hearing before the Special Board of Inquiry at Ellis Island, wherein the admissibility of the alien was passed upon, and of the petitioner's protests, that the matter submitted by the petitioner

[19] For a period of a year and a half the Immigration Rules specified a notice of only 30 days. Rules of February 1, 1924, Rule 22 (B) (1). Prior to and since these particular rules the period was and has been 60 days. See Rules of May 1, 1917 (August, 1922, Edition), Rule 28; Rules of July 1, 1925, Rule 22 (B) (1).

did not overcome the force of the certificate of the medical examiners.[11]

It thus appears that the Secretary's finding was made only after due notice to the petitioner and an opportunity to be heard. It further appears plainly that his finding was made upon substantial evidence, since in each case he had before him the certificate of the official medical examiners at the port of arrival.

The petitioner contends that the Secretary's action was arbitrary because, it is said, he treated the medical certificates of the Ellis Island physicians as conclusive regardless of whatever evidence there was the other way. This obviously is incorrect. The notices of the proposed fines were sent out only after the medical certificates were issued, and in each case the plaintiff was afforded ample opportunity to satisfy the Secretary that the certificates were erroneous. Except in one or two cases the petitioner's "protests" consisted merely of unverified statements of conclusions of facts. In none of the cases was the petitioner's proof so convincing as to justify the assertion that the Secretary acted arbitrarily in disregarding it.

The petitioner does not suggest that the examiners were biased or incompetent, and there is

[11] The departmental procedure with reference to the imposition and collection of fines is set forth in Rule 23 of the Immigration Rules of January 1, 1930, pp. 46–49, *infra*. Substantially the same rules have prevailed since the Immigration Act of 1917.

nothing to indicate that the medical examinations were not made exactly as required by the statute (See Sec. 16 of the Immigration Act of 1917, U. S. C., Title 8, Sec. 152) and the Public Health Service regulations. (See R. 343–349.) While it is true that the statute does not make it mandatory for the Public Health Service surgeons to render opinions concerning the detectability at the time of embarkation of a disease or defect ascertained to exist upon arrival, there is nothing in the immigration laws to prevent the Secretary from considering such opinions, and the Public Health Service regulations expressly contemplate the rendition thereof. (R. 346.) The certificates, even though unaccompanied by the data upon which they were based, were evidence of the facts therein stated for purposes of an administrative hearing. *United States* v. *Tod,* 296 Fed. 127 (C. C. A. 2d). See *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 342–343; *Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *White* v. *Chan Wy Sheung,* 270 Fed. 764, 766 (C. C. A. 9th), certiorari denied, 257 U. S. 654; *United States* v. *Day,* 33 F. (2d) 267 (C. C. A. 2d), certiorari denied, 280 U. S. 594; *Mason* v. *Tillinghast,* 27 F. (2d) 580 (C. C. A. 1st).

The petitioner contends that the Secretary "ignored" certain "official" evidence which he should have considered, consisting of (1) the medical certificate, to the effect that the alien was in sound physical condition, attached to the consular visa

issued to the alien,[12] and (2) the passenger manifest, a document required to be executed by the ship's officers and certifying that the aliens on board had been examined and were believed to be admissible.[13] That the Secretary failed to consider these documents does not appear from the record. Obviously, if there was any conflict in the various medical certificates required by the statutes, the Secretary was warranted in relying upon the certificate of the official immigration examiners rather than upon the certificates of doctors employed by the alien or by the steamship company. Moreover, there is nothing which indicates that the statutory provisions relating to visas and manifests were intended to relieve steamship companies of the obligation to make their own examination. See *North German Lloyd* v. *Elting,* 48 F. (2d) 547, 550 (C. C. A. 2d). In fact, the Public Health Service regulations contain an express warning to the contrary. (R. 207.)

Petitioner complains that the Secretary treated its "protests" as "comment on the evidence" and not as "evidence." So far as the protests consisted merely of unverified letters, it seems clear that the Secretary would have been warranted in not treating them as "evidence." But, assuming that the

[12] This certificate is made by a doctor employed by the alien. See R. 207. See also Immigration Rules of January 1, 1930, Rule 3 (G) (2).

[13] See Sections 12 and 13 of the Immigration Act of 1917 (U. S. C., Title 8, Secs. 148, 149).

letters should be treated as evidence of the facts therein stated, all that was thus placed before the Secretary were the conclusions of the Italian doctors, which conflicted with those of the doctors at Ellis Island.[14] With the proof thus conflicting, the Secretary was warranted in accepting the views of the American doctors.

There is nothing in the record which indicates that the petitioner ever requested permission to submit comprehensive affidavits or oral evidence to the Secretary setting forth in detail the methods employed by it in examining the aliens prior to embarkation,[15] or that after notice of a fine it requested a rehearing or reopening of a case for the presentation of new evidence or arguments. The mass of evidence introduced in the District Court, but never presented to the Secretary, demonstrates clearly that the petitioner might well have presented, if only in the form of letters, the evidence to support its claims. The fines in question were imposed over a period from 1923 to 1927, without, apparently, any effort on the part of the petitioner to change its mode of procedure in contesting fines.

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[14] In several of its protests the petitioner did not even assert that the particular alien involved had been given a competent medical examination abroad, the assertion being merely that it was the practice of the petitioner to cause all aliens to be examined carefully prior to embarkation. (R. 253, 258, 268.)

[15] Presumably such a request would have been granted. See Rule 23, Subdivision C, Par. 1, Immigration Rules of January 1, 1930, p. 48, *infra*. See also R. 141.

The contention that the imposition of the fine was a function of the Secretary of Labor which could not be delegated to an Assistant Secretary of Labor is, in our opinion, unfounded. See *Myers* v. *United States*, 272 U. S. 52, 117.

We submit there is no basis for the contention that the decisions of the Secretary were arbitrary.

IV

THE CASES INVOLVING SPECIAL CONSIDERATIONS

The petitioner contends that special considerations apply to certain cases which, wholly apart from its general argument, establish that the fines were illegal.

The second and third causes of action involve the aliens Marrara and Sbragia, who were found upon arrival to have been afflicted with physical defects which might affect their ability to earn a living, and which the examining physicians certified might have been detected by means of a competent medical examination at the port of embarkation. (R. 3–4, 231, 241.) The petitioner contends that no fines should have been imposed, since, in these cases, the question of admissibility is not solely a *medical* question, but one which turns largely on the personal judgment of the immigration officials as to whether, in view of all the circumstances affecting the particular alien, his defect is such that it may affect his ability to earn a living; that the question whether these aliens were

admissible could not be determined until their arrival in the United States; and that the petitioner is not liable to a penalty for bringing such aliens to this country so that they might satisfy the authorities, if possible, that they had the right to enter.

In plain language, Section 9 makes it unlawful "to bring to any port of the United States any alien" afflicted with a defect "of a nature which may affect his ability to earn a living," and makes the fine payable if "it shall appear to the satisfaction of the Secretary of Labor" that the alien was so afflicted at the time of foreign embarkation and that the existence of such defect "might have been detected by means of a competent medical examination at such time." There is nothing in the statute which creates an exemption from liability where the carrier is in doubt as to the alien's admissibility, or where the nature of the defect is such that its detectability or the determination of its effect upon the alien's earning ability is more than ordinarily difficult, or where the question of admissibility can only be answered with certainty by officials at the port of entry.[16]

[16] The difficulty of detecting certain disabilities and the chance of conflict of medical opinion in certain cases was stressed by representatives of the steamship companies at the committee hearings upon the bill which became the Immigration Act of 1903—the first immigration law which imposed a fine for bringing diseased aliens to the United States. In reply, the members of the committee pointed out that the imposition of the fine was vested in the discretion of the Sec-

Generally speaking, the question of admissibility in *all cases* can only be determined *with finality* upon arrival of the alien in the United States. (See Section 2 (g) of the Immigration Act of 1924, U. S. C., Title 8, Sec. 202 (g).) The penalty provisions of the second sentence of Section 9 would be of little effect if by exhibiting a medical certificate of its doctors to the effect that they could not be certain whether the defect in question would be held to be one which might affect the alien's ability to make a living the steamship companies are to be relieved of liability.

It is possible that cases may arise where it may be difficult for the carrier to determine whether the defect will be held by the local immigration authorities to be an excluding one. But even in such cases we submit that the steamship company should be held to act at its peril if it transports the alien. The fact that Congress has imposed a requirement which necessitates care in its observance affords no basis for ignoring the requirement. It is significant that there are certain classes of inadmissible aliens, such as criminals, polygamists, anarchists, etc. (see Section 3 of the Immigration Act of 1917, U. S. C., Title 8, Secs. 136–137), who may be transported by a carrier without penalty. Congress thus has expressly differentiated between excluding de-

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retary, and they were confident that the Secretary could be relied upon to administer the law fairly. See Senate Document No. 62, 57th Cong., 2d Sess., pp. 68, 191, 214, 244, 295, 296, 298, 299.

fects which it is reasonable to require the carrier to detect and others which it would be unreasonable to require the carriers to ascertain. Ample discretion has been imposed in the Secretary, the administrative official, to deal fairly with all cases where the carrier has acted with due diligence and in good faith."[17]

The petitioner relies upon *Compagnie Francaise De Navigation a Vapeur* v. *Elting,* 19 F. (2d) 773 (C. C. A. 2d). That case, if sound, is distinguishable. There the court was construing Section 6 of the Quota Act of 1921, as amended by the Act of May 11, 1922, which imposed a fine for bringing to the United States an alien inadmissible under that Act and provided that such fine should not be refunded unless it appeared to the satisfaction of the Secretary of Labor that the alien's inadmissibility could not have been ascertained by the steamship company prior to embarkation by the exercise of reasonable diligence. The alien in question had lawfully resided in the United States and claimed to be returning to an unrelinquished domicile. He was admissible as of right if he could show that his domicile had not been relinquished. The court held that *under the then applicable regulations* such

[17] A contention substantially similar to the one just discussed is answered more at length at pp. 21–29, of the brief for the petitioner in *Elting* v. *North German Lloyd*, No. 42, present term, *supra*. The Court is respectfully referred to the argument there made.

alien was entitled to come to a port of the United States for the purpose of presenting evidence on the disputed issue of abandonment, and that since the alien had the right, under the regulations, to come to the United States to present his claim for admission, the steamship company had not violated the statute by transporting him.

That the *Compagnie Francaise* case does not stand for the proposition that there can be no fine imposed for bringing to the United States a diseased or defective alien whose admissibility can not be finally determined except in the United States, is apparent from the same court's decision in *North German Lloyd* v. *Elting,* 48 F. (2d) 547, which involved the same statute as the instant case. In the latter case the court sustained fines imposed for bringing to the United States aliens with defects which might affect their ability to earn a living and whose admissibility could not be determined with certainty prior to embarkation for the same reasons that the admissibility of Marrara and Sbragia could not be determined definitely prior to embarkation. In the latter case it was further held that the fact that the Secretary possessed the power, under Section 21 of the Immigration Act of 1917 (U. S. C., Title 8, Sec. 158), to admit defective aliens under bond in certain cases, did not relieve the steamship company from fines in the event such aliens were not admitted by the Secretary.

The fifth and twelfth causes of action involve, respectively, the aliens Capaldo and Perazzi, whose ultimate destination was Canada and who intended merely to pass through the United States in transit. Both aliens held transit certificates signed by the American consul in Italy. Capaldo was found to be affected with a loathsome disease and Perazzi tc be feeble-minded, and both were excluded. (R. 7, 15, 253–255, 292–293, 303, 356.) The petitioner contends that the fines as to these aliens were illegally imposed since, it is asserted, the statute contemplates the imposition of fines only in the case of *immigrants* coming to the United States, and does not apply to aliens who seek to be admitted *only for transit* to another country.

Section 9 expressly states that "it shall be unlawful * * * to bring to the United States * * * any *alien* * * *." The obvious purpose of Section 9 was to exclude from this country diseased and defective foreigners, many of whom, prior to the enactment of the penalty provisions here involved, were eluding the examiners at the ports of arrival.[18] There was also the purpose to prevent the spread of disease among the passengers on shipboard during the voyage to this country. (See *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 332, 343; see also Senate Document No. 62, 57th Cong., 2d Sess., p. viii.) In the cases of Capaldo and Perazzi the dangers incident

[18] See Senate Report No. 2119, 57th Cong., 1st Sess., p. vi.

to the admission of diseased and defective aliens existed although their stay in this country was to be only temporary, and there was also the risk that the aliens might change their minds and remain in the United States indefinitely, although in violation of law.

The liability for the fine is predicated upon the bringing to the United States of an alien who is diseased or defective. There can be no distinction in this regard between an alien who comes for permanent or temporary residence and one who enters the country merely for the purpose of transit to another country. Assuming that Capaldo and Perazzi intended to enter the United States only for the purpose of transit to Canada, the fact remains that both aliens intended at the time of foreign embarkation *to enter the United States,* and this was known to the petitioner. Clearly such aliens were "brought" to the United States within the meaning of Section 9, and accordingly cases such as *Taylor* v. *United States,* 207 U. S. 120, and *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1035 (C. C. A. 2d), where, so far as could be known by the steamship company, the aliens at the time of embarkation never intended *to enter the United States,* are not analogous.[19]

The fourteenth cause of action involves the alien Costigliolo, a seaman who came to New York as a

[19] The *Taylor* case involved a statute which is not fairly comparable to the one involved here.

steerage *passenger,* at the expense of his employer, to board an Italian vessel at New York as a member of the crew to take the vessel back to Italy. He was found to be afflicted with a loathsome disease and excluded. (R. 18, 334–341.) What has been just stated with reference to Capaldo and Perazzi applies with equal force to Costigliolo. That Costigliolo was properly excluded there can be no doubt. *Karnuth* v. *United States,* 279 U. S. 231, 244. While he did not intend to remain permanently in the United States, his plans nevertheless necessarily required *an admission* to the United States, although his stay was to be brief.

The thirteenth cause of action involves the alien Crimi, who was totally blind, and who claimed to be coming to the United States as a student, having been issued a nonquota immigrant visa under Section 4 (e) of the 1924 Act (U. S. C., Title 8, Sec. 204 (e)) by the American consul. Upon arrival he was found not to be a *bona fide* student (R. 307, 324, 327), and was excluded by reason of being afflicted with a physical defect which might affect his ability to earn a living. (R. 16–17, 306–334.) The fifteenth cause of action involves the alien Nelli, an imbecile, a minor, and the son of a United States citizen residing in the United States. Nelli's father had filed a petition with the Commissioner General under Section 9 (b) of the Immi-

gration Act of 1924 (U. S. C., Title 8, Sec. 209 (b)), for the issuance of a nonquota visa to Nelli under Section 4 (a) of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 204 (a)), in which it was revealed that his son was feeble-minded. The Commissioner General approved the petition, whereupon, at the direction of the Secretary of State, a nonquota visa was issued to Nelli.[20] Upon his arrival he was held inadmissible by reason of his mental disability.[21] (R. 19, 358, 390–403.)

The petitioner contends that it was justified in accepting these aliens for transportation on the faith of the consular visas specially granted to them, and that the visas "were evidence either that the Department had already decided that this alien was admissible or had reserved the question for final determination at the port of arrival." But the petitioner was clearly unwarranted in accepting the visas as evidence of the aliens' admissibility in view of the specific provision of Section

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[20] See Section 9 (e) of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 209 (e)).

[21] Before the Board of Special Inquiry at Ellis Island, the alien's father testified, with respect to the alien, as follows (R. 396):

"Q. What did the steamship officials say to you about him?

"A. He said I may have trouble, but as the American consul gave a visa to him he might get through."

This would indicate that in Nelli's case the petitioner "took a chance."

2(g) of the 1924 Act[22] (U. S. C., Title 8, Sec. 202(g)), then in force, that—

> Nothing in this act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws. * * *

See *Chang Chan* v. *Nagle,* 268 U. S. 346.

The petitioner relies upon *Compagnie Francaise De Navigation a Vapeur* v. *Elting,* 19 F. (2d) 773 (C. C. A. 2d), *supra,* and *Spanish Royal Mail Line Agency, Inc.,* v. *United States,* 45 F. (2d) 404 (S. D. N. Y.). These decisions, if sound, are plainly distinguishable.

The *Compagnie Francaise* case, discussed at pp. 34–35, *supra,* did not rest on the fact that the alien possessed a visa, but upon the fact that the applicable regulations expressly permitted him to come to the United States to present his claim for admission.

The *Spanish Royal Mail Line* case involves the third sentence of Section 9 of the Immigration Act of 1917, which makes it unlawful to bring to the United States aliens who are excluded because of being illiterate, and imposes a fine if it shall appear to the satisfaction of the Secretary of Labor that this disability "might have been detected *by the exercise of reasonable precaution* prior to the de-

[22] See also Section 9 (f) of that Act (U. S. C., Title 8, Sec. 209 (f), which is in practically the same language.

parture of such aliens from a foreign port." The alien in question, who had formerly resided in the United States, held a permit to reenter this country, issued by the Commissioner General. The court found that as a matter of law the reentry permit could not have been issued unless the Commissioner General had found that the alien had previously been legally admitted, which finding in turn necessarily imported that at the time of his original entry the alien was able to read.[23] The court apparently held that the Secretary's ruling that the steamship company had failed to exercise "reasonable precaution," where it had relied upon the alien's possession of the reentry permit without making an independent investigation as to whether the alien was able to read, was arbitrary.

In the instant case, for reasons just stated, there exists no statutory basis for giving to the visas issued to Crimi and Nelli the legal significance which the court in the *Spanish Royal Mail Line* case held to be necessarily attached to the re-entry permit possessed by the alien there involved. Moreover, the statutory requirement in the instant case is not "reasonable diligence," as in the *Compagnie Francaise* case, or "reasonable precaution," as in the *Spanish Royal Mail Line* case but solely whether, in the opinion of the Secretary the disabilities might have been detected by means of a competent

[23] See Section 10 of the Immigration Act of 1924 (U. S. C., Title 8, Sec. 210). See also *United States ex rel. Iodice* v. *Wixon*, 56 F. (2d) 824 (C. C. A. 2d).

medical examination."[24] It may be conceded that the petitioner acted in good faith in the *Crimi* and *Nelli* cases and that it was not negligent. But the statutory test is not that of good faith or due care. As the court below pointed out (R. 415):

> * * * the plaintiff was bound to act with knowledge of the law and to know that it could not rely on an immigration visa to show that the alien was entitled to admission when he was in fact within one of the classes excluded.

Cf. *Lloyd Royal Belge Societe Anonyme* v. *Elting*, 55 F. (2d) 340 (S. D. N. Y.); *United States* v. *New York S. S. Co.*, 269 U. S. 304, 313.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
PAUL D. MILLER,
Attorney.

OCTOBER, 1932.

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[24] It should be borne in mind that even in cases where the statutory requirement is "reasonable diligence," or "reasonable precaution," to ascertain the excluding defect or the inadmissibility of the alien, the one to be satisfied as to whether the statutory test has been met is the Secretary of Labor, and his decision is final. See brief for the petitioner in *Elting* v. *North German Lloyd*, No. 42, present term, *supra*.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 9 of the Immigration Act of 1917, as amended by Section 26 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 166 (U. S. C., Title 8, Sec. 145), provides:

> That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien

for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section 3 of this Act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $250, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien who is excluded by the provisions of section 3 of this Act because unable to read, or who is excluded by the terms of section 3 of this Act as a native of that portion of the Continent of Asia and the islands adjacent thereto described in said section, and if it shall appear to the satisfaction of the Secretary of Labor that these disabilities might have been detected by the exercise of reasonable precau-

tion prior to the departure of such aliens from a foreign port, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien on whose account assessed.

If a fine is imposed under this section for the bringing of an alien to the United States, and if such alien is accompanied by another alien who is excluded from admission by the last proviso of section 18 of this Act, the person liable for such fine shall pay to the collector of customs, in addition to such fine but as a part thereof, a sum equal to that paid by such accompanying alien for his transportation from his initial point of departure indicated in his ticket, to the point of arrival, such sum to be delivered by the collector of customs to the accompanying alien when deported. And no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: *Provided,* That clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs: *Provided further,* That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or ex-

ceptions to section 3 of this Act exempted from the excluding provisions of said section.

IMMIGRATION RULES OF JANUARY 1, 1930

RULE 23. IMPOSITION AND COLLECTION OF FINES

Subdivision A.—Notice of intention to fine

PARAGRAPH 1. Whenever the medical examiner certifies that an arriving alien is afflicted with any of the diseases or disabilities mentioned in section 9 of the act of February 5, 1917, as amended by the immigration act of 1924, and that, in his judgment, such disease or disability existed at the time of foreign embarkation and might have been detected by means of a competent medical examination at such time, the vessel or transportation agency shall pay to the collector of customs (under notice of intention to fine) $1,000 for each of such aliens and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival.

PAR. 2. In the case of any alien afflicted with any mental defect other than those specifically named in said section 9, as amended, or physical defect of a nature which may affect ability to earn a living, when certified as in paragraph 1 hereof, the vessel or transportation agency shall pay to the collector of customs (under notice of intention to fine) $250 for each of such aliens and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival.

* * * * *

Subdivision B.—Service of notice

PARAGRAPH 1. The officer in charge shall serve promptly upon the master, agent, owner, or consignee of the vessel, or other responsible person, a notice to the effect that the ascertained facts indicate that a fine should be imposed under the section of the law involved in the particular case; that he will be allowed 60 days from the date of service of the notice within which to submit evidence and be heard in reference to the matter; and that in the meantime the vessel involved, which is the subject of fine proceedings, will be granted clearance papers upon the condition that he deposit with the collector of customs, prior to the time of sailing, a sum equal to the fine specified in the said notice, such sum to be held as security for the payment of the fine in the event it should be imposed (or bond with sufficient surety approved by the collector of customs to secure payment thereof, where such is permitted by the act of May 26, 1924), and, in cases arising under section 9 of the act of February 5, 1917, as amended by the immigration act of 1924, or under section 16 of the immigration act of 1924, a sum equal to that paid by the alien involved for his transportation to this country from the initial point of departure, such latter sum to be held by the collector of customs as a special deposit and to be delivered to the deported alien through the American consul, if fine is imposed; and when such alien is accompanied by another alien who is excluded from admission a further sum equal to that paid by such accompanying alien for his transportation to this country from the initial point of departure, which likewise is to be held by the collector of cus-

toms and delivered to the accompanying alien when deportation is effected.

PAR. 2. Such notice shall be prepared in quadruplicate. The original shall be served on the master, agent, owner, or consignee of the vessel either by (*a*) delivering it to him in person, or (*b*) leaving it at his office, or, whenever the immigration officer in charge finds either of these methods of service inconvenient, (*c*) mailing it to him. When service is made by delivery it shall be admitted in writing upon the duplicate and triplicate and the admission witnessed by the server. If admission be refused, or in case of service by either of the other methods, the server shall note the method and date of service on the duplicate and triplicate. The duplicate shall be retained by the immigration officer in charge. The triplicate shall be delivered to the collector of customs for the district wherein the port of arrival is located, who shall withhold clearance papers until the deposit is made and the quadruplicate shall be forwarded to the bureau when the matter of fine is presented for departmental consideration.

Subdivision C.—Submission of evidence and report

PARAGRAPH 1. If said deposit be made, or bond furnished, further proceedings shall be suspended during said period of 60 days, or until earlier submission of evidence to show why the proposed fine should not be imposed. Such evidence, if submitted, shall be forwarded to the bureau, together with the medical certificate, if any, quadruplicate notice, and the data or evidence on which the notice was based, and the officer in charge shall pre-

sent at the same time his written views as to whether the fine should be imposed. If within 60 days no evidence has been submitted, or as soon as it is known that the fine will not be contested, the officer in charge shall report the facts to the bureau.

Subdivision D.—Remission or mitigation of fine

PARAGRAPH 1. The fine prescribed by section 35 of the act of February 5, 1917, for bringing to United States ports as employees of vessels aliens afflicted with idiocy, imbecility, insanity, epilepsy, tuberculosis in any form, or a loathsome contagious or dangerous contagious disease will be mitigated or remitted by the department only upon a clear and convincing showing to the effect that the imposition of the full penalty or of any part thereof would be unjust or inequitable under the circumstances of the particular case, including the submission of satisfactory evidence that the seamen were subjected to a competent medical examination before being signed on as members of the crew.

Subdivision E.—Action on decision

PARAGRAPH 1. Upon receipt of the departmental decision the collector of customs shall be notified of its terms. If the fine is imposed, the amount retained as security shall be disposed of by the collector in accordance with law. If the fine is not imposed, he shall return such amount to the depositor.

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